BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALICIA CABRERA	)	
Claimant	)	
VS.	)	
	)	Docket No. 198,074
CASCO, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 28, 2000 Review and Modification Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on September 8, 2000, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the April 28, 2000 Review and Modification Award.

ISSUES

By Order dated April 22, 1997, the Appeals Board found that claimant was entitled to receive benefits for a 65 percent permanent partial general disability followed by an 11 percent permanent partial general disability as the result of a May 18, 1995 neck injury. After that award, claimant returned to work for respondent but was subsequently laid off in a general plant closure in April of 1999. Claimant filed this review and modification proceeding and now alleges that (1) she now has a work disability because of the layoff and (2) she has developed a low back injury that is the natural and probable consequence of the neck injury.

On April 28, 2000, Judge Barnes ruled on claimant's request to modify the April 22, 1997 Order. In the April 28, 2000 Review and Modification Award, which is the subject of this appeal, Judge Barnes ruled that claimant's award should not be modified. The Judge found that claimant's disability from the neck injury had not increased and that claimant's low back problems were not a natural and probable consequence of the neck injury.

Claimant contends Judge Barnes erred. Claimant argues that she has either an 83.34 percent permanent partial general disability or, in the alternative, a 40.84 percent permanent partial general disability.

Conversely, respondent and its insurance carrier contend the Review and Modification Award should be affirmed. They argue that claimant's functional impairment did not increase following the initial award and that the medical evidence failed to link any low back problems to the earlier neck injury. They also argue that claimant has not made a good faith effort to find appropriate employment following the plant closure. Therefore, respondent and its insurance carrier argue that the Board should impute the wages that claimant was earning at the time she was laid off as she has demonstrated the ability to earn those wages. Thus, respondent and its insurance carrier contend that claimant's permanent partial general disability should be limited to claimant's whole body functional impairment rating.

The only issues before the Appeals Board on this review are:

1. Has claimant's permanent partial general disability changed due to either the plant closure or low back problems?

2. If so, what is claimant's new permanent partial general disability rating?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant injured her neck while working for respondent and underwent a discectomy and C5-6 fusion. By Order dated April 22, 1997, the Appeals Board found that claimant sustained a series of mini-traumas to her neck and found that May 18, 1995, should be used as the date of accident for computing claimant's benefits. The Board found that claimant had a 65 percent permanent partial general disability for the period from August 25, 1995, through April 7, 1996, followed by an 11 percent permanent partial general disability commencing April 8, 1996.

In the initial award, the Board found that the permanent partial general disability decreased from 65 percent to 11 percent, which was the stipulated whole body functional impairment rating, because claimant refused to attempt to perform an accommodated job that respondent had offered, despite the fact that claimant was unemployed at the time of

the offer. Claimant appealed the Board's decision to the Court of Appeals, which affirmed the Board.

2. Sometime after the Appeals Board entered the April 22, 1997 Order, claimant returned to work for the respondent.[1] According to claimant's uncontroverted testimony, respondent accommodated claimant's injuries.

3. In September 1997, claimant developed pain in her forearms. Claimant attributed her symptoms to her job of cutting excess plastic from parts with scissors and lifting boxes filled with product. In late July 1998, claimant had surgery on the right wrist. And in early August 1998, claimant had surgery on the left wrist. Claimant filed a workers compensation claim for her bilateral arm injuries, which is the subject of Docket #228,987 and which is also being decided by the Board this date.

4. In June 1998, claimant began experiencing problems in her lower back that she attributed to lifting boxes and bending at work. Claimant filed a workers compensation claim for the low back, which is the subject of Docket #234,374 and which is also being decided by the Board this date. Nonetheless, claimant also contends in this appeal that the low back problem is the natural and probable consequence of the neck injury.

5. Claimant worked for respondent through April 30, 1999, when she was laid off after the manufacturing plant closed. During the second week of May 1999, claimant began receiving unemployment benefits. To comply with requirements from the unemployment office, claimant began contacting two employers each week seeking work.

6. Claimant's native language is Spanish. In July 1999, claimant began taking English courses through the unemployment office. At the time of the July 1999 review and modification hearing, claimant expected those courses to continue through January 2000. At the time of the July 1999 hearing, claimant was no longer looking for work as the unemployment office had suspended that requirement while claimant was attending English classes.

7. The parties stipulated that claimant's average weekly wage was $282.90. Claimant was unemployed at the time of the review and modification hearing held in July 1999. Therefore, comparing claimant's actual pre-injury wage to her post-injury wage, claimant's actual wage loss is 100 percent. But, according to claimant's vocational expert Karen Crist Terrill, claimant retains the ability to earn $6 per hour, which equates to $240 per week and which would yield a wage difference of 15 percent.

8. When this claim was initially litigated, Dr. Lawrence Blaty examined and evaluated claimant at her attorney's request. In February 1996, Dr. Blaty testified that because of the

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[1] According to Dr. Pedro A. Murati's testimony, claimant was rehired in June 1997.

neck injury claimant had lost the ability to do three of ten, or 30 percent, of claimant's former work tasks.

Dr. Blaty also testified that he had placed the following restrictions on claimant:

> I had restricted her to limiting her function to the light medium physical demand category, which is considered lifting no more than 35 pounds occasionally, 25 pounds frequently, or 10 pounds constantly. I also recommended that she be limited to no more than occasional overhead reaching activities and she avoid any prolonged or repetitive flexion-extension activities with her neck.[2]

At the February 1996 regular hearing, claimant testified that the task list that Dr. Blaty considered accurately described the job tasks that she had performed during the 15 years before she sustained the neck injury.

Based upon the above, the Appeals Board finds that claimant has lost the ability to perform 30 percent of the work tasks that she performed before she sustained her neck injury and underwent surgery.

9. The Appeals Board affirms the Judge's finding that claimant has failed to prove that her low back problems are related to the work-related neck injury.

CONCLUSIONS OF LAW

1. The April 28, 2000 Review and Modification Award should be modified commencing May 1, 1999, to increase claimant's permanent partial general disability rating from 11 percent to 65 percent.

2. The Workers Compensation Act provides that an award may be modified, among other reasons, when there is a change in either the worker's functional impairment or work disability. The Act reads, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that **the award**

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[2] Deposition of Lawrence Richard Blaty, M.D., February 13, 1996; p. 28.

> **is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award,** or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[3] (Emphasis added.)

3. Kansas law is well-settled that placing an injured worker in an accommodated position artificially avoids or suspends a work disability (a disability greater than the functional impairment rating) by allowing the worker to perform work for a comparable wage. But once the accommodated job ends, the work disability is no longer suspended.[4]

When claimant was laid off, she lost her accommodated job. Claimant is now left to search for other work in the open labor market with work restrictions and limitations arising from the neck injury, which diminished her ability to work. Because of that change in circumstances, the Appeals Board finds the initial award should be reviewed and modified, if appropriate.

4. Because a neck injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[3] K.S.A. 44-528(a).

[4] *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Court of Appeals held that a worker could not avoid the conclusive presumption against having a work disability, as contained in K.S.A. 1988 Supp. 44-510e, by refusing to return to work for the employer in an accommodated job that paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon his or her ability to earn rather than the actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

5. At the time of the July 1999 review and modification hearing, claimant was taking English classes, which would hopefully increase her employment opportunities. Because of those classes, the unemployment office suspended the requirement that claimant actively seek work. Although this is a close question, the Appeals Board concludes that claimant has satisfied the requirement that she make a good faith effort to find appropriate employment following her layoff. The Board concludes that the English classes are part of claimant's job search process and, therefore, claimant was exercising good faith while attending those classes. Successfully completing those classes would enhance claimant's chances of finding work and thereby would benefit respondent and its insurance carrier. Therefore, the 100 percent actual wage loss should be used in the permanent partial general disability formula.

6. Averaging the 100 percent wage loss with claimant's 30 percent task loss yields a 65 percent permanent partial general disability. Therefore, commencing May 1, 1999, the 11 percent permanent partial general disability found in the initial award increases to 65 percent. The Board notes that the award may be modified upon claimant completing her English classes and obtaining employment, or if she should fail to continue making a good faith effort to find appropriate employment.

7. The Appeals Board adopts the findings and conclusions made in the Orders executed this date in Docket #228,987 and Docket #234,374.

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Copeland*, p. 320.

AWARD

WHEREFORE, the Appeals Board modifies the April 28, 2000 Review and Modification Award and increases the permanent partial general disability commencing May 1, 1999, from 11 percent to 65 percent.

Alicia Cabrera is granted compensation from Casco, Inc., and its insurance carrier for a May 18, 1995 accident and resulting disability. Based upon an average weekly wage of $282.90, Ms. Cabrera is entitled to receive 20.75 weeks of temporary total disability benefits at $188.61 per week, or $3,913.66.

For the period from August 25, 1995, through April 7, 1996, Ms. Cabrera is entitled to receive 32.43 weeks of permanent partial disability benefits at $188.61 per week, or $6,116.62, for a 65 percent permanent partial general disability.

For the period from April 8, 1996, through July 4, 1996, Ms. Cabrera is entitled to receive 12.59 weeks of permanent partial disability benefits at $188.61 per week, or $2,374.60, for an 11 percent permanent partial general disability.

For the period commencing May 1, 1999, Ms. Cabrera is entitled to receive 208.86 weeks of permanent partial disability benefits at $188.61 per week, or $39,393.08, for a 65 percent permanent partial general disability. Under the Workers Compensation Act, temporary and permanent partial general disability benefits are limited to a maximum of 415 weeks commencing with the date of accident.[8] In this instance, Ms. Cabrera's 415-week period for benefits ceases May 1, 2003, causing Ms. Cabrera to lose 12.13 weeks of benefits that would otherwise be payable. The total award is $51,797.96.

As of November 30, 2000, there is due and owing to the claimant 20.75 weeks of temporary total disability compensation at $188.61 per week, or $3,913.66, plus 127.88 weeks of permanent partial general disability compensation at $188.61 per week, or $24,119.45, for a total due and owing of $28,033.11, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $23,764.85 shall be paid at $188.61 per week until paid or further order of the Director.

The Appeals Board adopts the orders set forth in the Review and Modification Award that are not inconsistent with the above.

IT IS SO ORDERED.

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[8] K.S.A. 44-510e(a).

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Douglas D. Johnson, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director